United Nations CCPR/C/122/D/2264/2013

International Covenant on Civil and Political Rights

Distr.: General
29 August 2018

Original:

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2264/2013*, **, ***

Communication submitted by:	Deepan Budlakoti (represented by the Canadian Civil Liberties Association)
Alleged victim:	The author
State party:	Canada
Date of communication:	4 July 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 10 July 2013 (not issued in document form)
Date of adoption of Views:	6 April 2018
Subject matter:	Deportation from Canada to India
Procedural issues:	Exhaustion of domestic remedies; level of substantiation of claims; incompatibility *ratione materiae* with the provisions of the Covenant
Substantive issues:	Right to liberty and security of person; right to enter own country; access to justice; right to family life; right to acquire a nationality
Articles of the Covenant:	2 (3), 3, 4, 9, 12 (4), 14, 17, 23 (1) and 24 (3)
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

1.1 The author of the communication is Deepan Budlakoti, born in Canada in 1989. The author is subject to deportation to India following the revocation of his permanent resident status by decision of the Immigration and Refugee Board on 8 December 2011. He claims that his deportation would amount to a violation by Canada of his rights under articles 2, 3,

* Adopted by the Committee at its 122nd session (12 March–6 April 2018).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Ivana Jelić, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. Pursuant to rule 90 (1) (a) of the Committee's rules of procedure, Marcia V.J. Kran did not participate in the examination of the communication.

*** A joint opinion by Committee members Yuval Shany and Christof Heyns (partly concurring, partly dissenting) is annexed to the present Views.

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4, 9, 12 (4), 14, 17, 23 (1) and 24 (3) of the Covenant. The Optional Protocol entered into force for the State party on 19 August 1976. The author is represented by counsel.

1.2 On 10 July 2013, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, informed the author that it had denied his request for the provision of interim measures consisting of the issuance of a request to the State party to refrain from removing him to India pending the examination of the communication.

The facts as submitted by the author

2.1 The author was born on 17 October 1989 in Ottawa, to parents of Indian nationality. He has lived his entire life in Canada. He has always considered himself to be a Canadian national. In 1985, his parents obtained employment as domestic servants at the High Commission of India in Ottawa. They were issued with Indian diplomatic passports in September 1985 and lawfully entered Canada the same month. They worked for the Deputy High Commissioner of India from September 1985 to August 1988 and for the High Commissioner of India from August 1988 to June 1989. In June 1989, they ceased their employment with the High Commission of India. The same month, they were employed by a Canadian couple who did not have any official connections to the High Commission.

2.2 The author's father obtained a Canadian visitor visa on 12 June 1989. The author claims that at the time of his birth, his parents were lawfully in the State party as visitors, and not by virtue of their diplomatic passports. After June 1989, the author's father also began the process of changing the status of his and his wife's passports. On 12 December 1989, the author's father received his non-diplomatic passport, while the author's mother received hers on 19 December 1989.

2.3 In 1992, the author's parents applied for and obtained status as permanent residents of Canada. As they believed that the author was a Canadian citizen by virtue of his birth in Canada, they did not apply for him to obtain permanent resident status. On 14 June 1993, the author's brother was born in Canada. He is a Canadian citizen.

2.4 The author's mother and father applied for Canadian citizenship in 1996 and 1997, respectively. As they believed that the author was a Canadian citizen, they did not apply for proof of citizenship for him. The author's mother received her Canadian passport on 17 June 1997. The author and his brother were listed as her children on the passport. The author's father received his passport on 18 January 1999 and the author's brother received his on 4 September 2003. The author received a Canadian passport on the same date as his brother, and notes that this was consistent with his and his parents' belief that he was a Canadian citizen by birth. He held a Canadian passport from 2003 to 2008.

2.5 On 1 December 2009, the author pleaded guilty to a charge of breaking and entering under sections 348 (1) (a)–(b) of the Canadian Criminal Code. He was also charged under section 145 (5.1) of the Criminal Code with failing to comply with conditions of undertaking given by an officer in charge. He was convicted and sentenced to four months' imprisonment, as well as 12 months' probation. On 14 December 2010, he was convicted of two counts of trafficking a firearm, contrary to section 99 (2) of the Criminal Code; one count of possession of a firearm while prohibited by indictment, contrary to section 117.01 of the Criminal Code; and one count of trafficking a Schedule I substance, contrary to section 5 (1) of the Controlled Drugs and Substances Act. He was sentenced to three years and eight months of presentence custody for trafficking and possessing the firearms, one year of concurrent custody for possession and six months of concurrent custody for trafficking a Schedule I substance.

2.6 The author first heard the claim that he was not a Canadian citizen in April 2010 from a Canada Border Services Agency officer while incarcerated. On 27 May 2010, admissibility proceedings commenced against him. At the admissibility hearing on 24 October 2011, the Minister of Public Safety and Emergency Preparedness argued that the author was not eligible to remain in Canada, that he was not a Canadian citizen, that his Canadian passport had been issued in error, that his conviction qualified as serious criminality and that, therefore, he should be rendered "inadmissible" to Canada pursuant to the Immigration and Refugee Protection Act. On 8 December 2011, the member of the

Immigration Division of the Immigration and Refugee Board adjudicating the admissibility hearing found that the author was ineligible to remain in Canada and issued a deportation order against him.

2.7 The author applied for judicial review of the decision on 19 December 2011. On 24 May 2012, his application for judicial review was rejected. On 21 September 2012 he was issued with a restricted pre-removal risk assessment application, and he filed a full pre-removal risk assessment application on 5 October 2012. On 3 November 2012, it was determined in the assessment that he would not be at risk of human rights violations if he were to be deported to India. His application for a full pre-removal risk assessment hearing was rejected on the same date. As a result of the negative assessment, the removal order against him was put into force. The author applied for legal aid in order to seek judicial review of the rejection of the full pre-removal risk assessment. However, his application was denied and, after consultation with his counsel, who had represented him at the hearings and who informed him that there was little prospect of success, the author decided not to pursue a judicial review.

The complaint

3.1 The author claims that by issuing a deportation order against him, the State party breached his rights under article 12 (4) of the Covenant. He argues that he considers Canada to be his "own country" within the meaning of article 12 of the Covenant. The author refers to the Committee's Views in *Warsame v. Canada*, in which the Committee noted that "there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words 'his own country' invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere".[1] The author argues that Canada is his own country, as he was born in Canada and has lived there ever since. He was raised and educated in Canada, his immediate family lives in Canada and he has no connection to any other country. He wishes to stay close to his family. He notes that he established his own construction business in 2008, which he was forced to close while imprisoned. He wishes to reopen this business and make a contribution to Canada. He argues that he has been rehabilitated and that the decision to deport him is therefore unjustifiable and grossly disproportionate to any legitimate aim. He further argues that he has no connection to India, no knowledge about the customs or the diverse languages in India, and no relationship or connection to any person in India. He argues that, if deported, he would therefore be highly vulnerable, given his inability to speak any of the country's languages, his lack of knowledge about its customs and culture, and the serious and gross human rights violations occurring in India.[2] He notes that he has only visited India once, for a period of two weeks when he was 11 years old. The author submits that his deportation to India would be arbitrary and amount to an unreasonable deprivation of his right to enter his own country.

3.2 The author further claims that deporting him to India would amount to a violation of his right to protection from arbitrary interference with his family life under articles 17 and 23 (1) read alone and in conjunction with article 2 (3) of the Covenant, as he would be separated from his mother, father and brother. He argues that, owing to financial reasons, his family would be unable to visit him in India, and that the interference with his family life is arbitrary and unlawful as the consequences of his removal are disproportionate to the State party's aim of preventing crime.

3.3 The author also claims a violation of his rights under articles 9 and 14 of the Covenant. He notes that, pursuant to section 3 (1) (a) of the Citizenship Act, a person born in Canada after 14 February 1977 is a citizen of Canada. He further notes that, under section 3 (2) of the Act, this provision does not apply to a person "if, at the time of his birth,

[1] See *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 8.4.

[2] The author refers to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to India (A/HRC/23/47/Add.1); Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police* (2009); and Amnesty International, *Amnesty International Report 2013: The State of the World's Human Rights*.

neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government; (b) an employee in the service of a person referred to in paragraph (a)". He argues that the exemptions in the Act do not apply to him as his parents were not diplomats, diplomatic representatives or employees thereof at the time of his birth, as they had ceased their employment for the High Commission of India before he was born. The author argues that the Immigration and Refugee Board erred in fact and in law in determining that he was not a Canadian citizen. The author additionally submits that he was denied a full pre-removal risk assessment, and that he was denied a judicial review of the Immigration and Refugee Board's decision that he was inadmissible in Canada. He argues that the State party's decision to deport him is tantamount to rendering him stateless, as India has denied that he is an Indian citizen.

3.4 As remedies, the author requests the Committee to advise the State party to (a) quash the deportation order against him; (b) permit him to remain in the State party; and (c) recognize him as a citizen of Canada.

3.5 In his comments, dated 12 January 2015, on the State party's observations, the author also claimed a violation of his rights under articles 3, 4 and 24 (3) of the Covenant.

State party's observations on admissibility and the merits

4.1 In its observations on admissibility and the merits of the communication dated 10 January 2014, the State party submits that the communication is inadmissible for failure to exhaust domestic remedies pursuant to article 5 (2) (b) of the Optional Protocol. It further submits that the author's claims under articles 9 and 14 are also inadmissible owing to their incompatibility with the provisions of the Covenant and insufficient substantiation. In the alternative, the State party submits that the author's claims are without merit.

4.2 The State party notes that in Canada, diplomatic privileges and immunities are only accorded to diplomatic agents and other categories of diplomatic staff whose names appear on a register or list maintained by the Office of Protocol. Foreign missions operating in Canada are required to inform Canada of the termination of employment of any of their representatives or staff, such that the names of those persons may be struck from the list or register.

4.3 The State party notes that government records indicate that the High Commission of India informed Canada of the termination of the author's parents' employment on 21 December 1989, stating that the author's father's employment had terminated on 12 December 1989 and that the author's mother's employment had terminated on 20 December 1989. As a result, the author's parents' names were taken off the list of persons with diplomatic status on 2 January 1990. Government records further indicate that the author's father received a work permit, the authorization required for a foreign national to legally work in Canada, on 5 January 1990. The State party argues that, at the time of the author's birth, under Canadian law, the author's parents were officially employed by the High Commission of India and had diplomatic status. As such, the author did not acquire citizenship by virtue of his birth. The State party notes that the exception that children born in Canada of foreign representatives do not acquire citizenship by birth under the Citizenship Act is consistent with the principle that foreign representatives are not truly under the jurisdiction of the receiving State. It also argues that the author's present situation cannot in any way be attributable to Canada.

4.4 Children born in Canada of foreign nationals with diplomatic status may apply for permanent resident status and may eventually become naturalized Canadian citizens. In the case of the author, his parents submitted an application for permanent resident status on 2 January 1992, which included the author. The application was accepted and the family obtained permanent resident status on 18 August 1992. While the author's parents applied for citizenship on their own behalf, there is no record of them having applied for citizenship for the author, or of him having applied for citizenship on his own behalf. The State party acknowledges that the author was issued with a Canadian passport on two occasions, on the basis of his birth certificate and the statement by his parents that he was a Canadian citizen. The State party argues that, by law, the author was not entitled to the passports, which

should not have been issued. The issuance of the passports in those circumstances was not a grant of citizenship, nor does it constitute proof of citizenship.

4.5 The State party notes that the author lost his permanent resident status after having been convicted of serious criminality, namely two counts of unlawful transfer of a firearm, possession of a firearm while under prohibition and trafficking in cocaine. He was sentenced to three years' imprisonment. Under section 36 (1) (a) of the Immigration and Refugee Protection Act, a permanent resident or a foreign national is inadmissible on grounds of serious criminality if he has been convicted of a criminal offence for which a term of imprisonment of more than six months has been imposed. On 24 October 2011, the Immigration Division of the Immigration and Refugee Board held a hearing to consider the author's case. The Division is an independent, specialized, quasi-judicial tribunal that conducts immigration admissibility hearings. At the hearing, the author was represented by counsel and had the right to adduce evidence and make submissions. The author admitted that his convictions fell within the definition of serious criminality under the Immigration and Refugee Protection Act and the only issue remaining was the question of his citizenship status. On 8 December 2011, the Division determined that he was not a Canadian citizen and that he was inadmissible on the grounds of serious criminality.

4.6 The author subsequently submitted a pre-removal risk assessment application. In his application, the author stated that he did not know the language or culture of India and would have very little support if sent there. He claimed that the only place where he could find even a modicum of support was in the town where his parents were from in Uttar Pradesh. He claimed that he would be economically and socially marginalized and would be identified as a person deported from Canada for criminality. He alleged that, as a result, he would be targeted by the local police, who are known for illegal detention, torture, ill-treatment and extrajudicial killings. On 3 November 2012, the pre-removal risk assessment officer concluded that the author was not in need of protection. The officer acknowledged the evidence of police malpractice in India, but determined that the author had provided insufficient evidence to establish that he would be targeted by the police. The officer also noted that the author did not have to live in Uttar Pradesh, but could live in a large urban area such as New Delhi. The State party notes that, in his complaint before the Committee, the author stated that he had not submitted an application for judicial review of the negative pre-removal risk assessment decision. It informs the Committee that the author submitted such an application on 19 August 2013.

4.7 The State party submits that the author's claims, particularly those under articles 12 (4), 17 and 23, are inadmissible for failure to exhaust domestic remedies by submitting applications for (a) a declaration of citizenship to the Federal Court of Canada; (b) permanent residence on the basis of humanitarian and compassionate considerations; (c) a temporary resident permit; (d) a discretionary grant of citizenship; and (e) a criminal record suspension. It notes that, on 23 September 2013, the author submitted an application for a declaration of citizenship to the Federal Court, which remains pending. He based his application on a number of provisions of the Canadian Charter of Rights and Freedoms, including the right to procedural fairness, the right to be free from arbitrary detention and the right of citizens to enter, remain in and leave Canada. Under section 24 (1) of the Charter, if the Court determines that an individual's rights have been violated, the Court is empowered to grant a remedy that is "appropriate and just". The State party submits that, as the author is pursuing an available and effective domestic remedy, the Committee is precluded from examining the communication on its merits.

4.8 The State party also submits that the complaint is inadmissible for failure to exhaust other domestic remedies. It notes that the author has not submitted an application for permanent residence on the basis of humanitarian and compassionate considerations, which is available to him under section 25 (1) of the Immigration and Refugee Protection Act. The assessment of such an application consists of a broad, discretionary review by an officer to determine whether a person should be granted permanent residence in Canada for humanitarian and compassionate reasons. The test is whether the applicant would suffer unusual, undeserved or disproportionate hardship if he or she had to apply for a permanent resident visa from outside of Canada. Some examples of hardship include lack of critical medical or health care, discrimination that does not amount to persecution and adverse

country conditions that have a direct, negative impact on the applicant. The State party submits that, to the extent that the author claims that Canada is "his own country" within the meaning of article 12 (4) of the Covenant and that he should not be separated from his family or friends, that process is the most appropriate and potentially the most effective remedy for him. It argues that the focus of the author's communication is an alleged right to remain in Canada based on family and humanitarian grounds, for which an application under the humanitarian and compassionate procedure is the remedy that is most directly applicable to the nature of his claim.

4.9 Additionally, the State party argues that the author could also have submitted an application for a temporary resident permit under section 24 of the Immigration and Refugee Protection Act, under which a person who has been determined to be inadmissible to Canada may be granted a temporary resident permit if an officer "is of the opinion that it is justified in the circumstances". In exercising this discretion, designated officers must take into consideration any instruction from the Minister and weigh the risk to Canada against the reasons for permitting temporary residence. Humanitarian and compassionate factors may be raised by the applicant and considered by the decision maker. A temporary resident permit is valid for up to three years, may be extended and may be cancelled at any time. It cannot lead to permanent resident status. The State party notes that, as per statistics, 888 persons who were inadmissible on the grounds of serious criminality received temporary resident permits in 2012.

4.10 The State party further argues that the author has also failed to exhaust domestic remedies by submitting an application for discretionary grant of citizenship under the Citizenship Act, which includes a provision for the discretionary grant of citizenship to alleviate cases of special and unusual hardship. The State party concedes that this provision is rarely used, but argues that this does not mean that it is not a potentially effective remedy. Finally, the State party submits that the author will eventually be able to apply to the Parole Board of Canada for a record of suspension (pardon). Such an application will, however, not be available to the author until 10 years after his conviction, namely in 2020. The effect of a record of suspension is that the author would no longer be considered inadmissible to Canada. The State party concedes that this is not a remedy that is immediately available to the author but argues that it is a remedy that may eventually eliminate the adverse effects of the author's criminal convictions on his ability to enter and remain in Canada.

4.11 The State party further submits that the author's claims under articles 9 and 14 are inadmissible on the grounds of being incompatible with the provisions of the Covenant, or in the alternative, for non-substantiation. It notes that, as concerns his claims under article 9 of the Covenant, the author appears to be alleging that he is being erroneously or wrongfully denied citizenship and that he suffers from fear and distress at the prospect of being deported to India. The State party submits that article 9 of the Covenant does not encompass a right to citizenship, whether on the basis of the principle of *jus soli* or otherwise, or on the basis of protection from serious human rights violations in the country to which a person is being deported. It further argues that, even if the author's claims under article 9 were to be read as claims under articles 6 and 7 of the Covenant, he has failed to substantiate, for the purposes of admissibility, that he would face a real and personal risk of death, torture or other similarly serious harm if deported to India.

4.12 As concerns the author's claim under article 14, the State party notes that the author has alleged that he was denied the right to access to justice, that he was wrongfully denied a full pre-removal risk assessment hearing and that he was denied judicial review of the Immigration and Refugee Board's decision finding him to be inadmissible in Canada. It refers to the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which the Committee has expressed that article 14 does not apply to expulsion or deportation procedures. It submits that the author's claims are therefore inadmissible on the grounds of incompatibility with the provisions of the Covenant. In the alternative, the State party submits that the author's claims are insufficiently substantiated, as he has not provided any argument as to why the restricted pre-removal risk assessment was in violation of his rights under the Covenant. It further submits that the author was "denied" judicial review of the Immigration and Refugee

Board's decision only in the sense that he was unsuccessful in his application seeking judicial review.

4.13 In its observations on the merits of the communication and as concerns the author's claims under articles 9 and 14 of the Covenant, the State party submits, on the basis of its argument as to why the allegations are insufficiently substantiated, that they are without merit.

4.14 Regarding the author's claims under article 12 (4) of the Covenant, the State party submits that the author's birth in Canada does not, in and of itself, put him in a better or more favourable position than any other foreign national who has been convicted of serious crimes in Canada. Because of the author's parents' diplomatic status at the time of his birth, the author did not automatically become a Canadian citizen by virtue of being born in Canada. The State party argues that this is not a case where citizenship has been wrongfully or arbitrarily withheld from the author, as he has not applied for Canadian citizenship. It refers to the Committee's views in *Stewart v. Canada*, in which the Committee held that if a State facilitates the acquisition of its nationality, but the author refrains from obtaining it, either by choice or by committing criminal acts that will disqualify him from acquiring that nationality, the State does not become "his own country" for the purposes of article 12 (4).[3] The State party submits that, in the circumstances, it cannot be said that Canadian citizenship legislation is arbitrary or unreasonable in not conferring citizenship at birth to children born in Canada to parents with diplomatic status. It also notes that, if not for his criminal convictions, there would not have been any impediment to the author's acquiring Canadian citizenship.

4.15 The State party submits that, whether or not Canada can be considered the author's "own country" for the purposes of article 12 (4), it remains to be determined whether the prospective deportation of the author to India would be arbitrary. The State party submits that its citizenship law, which exempts children born to persons holding diplomatic status from citizenship, is consistent with international law and is in no way arbitrary. It further submits that it is not arbitrary to remove someone who is not a citizen and who has committed serious crimes, nor is it unreasonable, as the author is not at personal risk of any form of serious or irreparable harm in India.

4.16 As concerns the author's claims under articles 17 and 23 (1) of the Covenant, the State party refers to the Committee's general comments No. 15 (1986) on the position of aliens under the Covenant, No. 16 (1988) on the right to privacy and No. 19 (1990) on the family and notes that States enjoy wide discretion when expelling aliens from their territory. It argues that the removal of an individual from a State's territory will violate articles 17 and 23 only if immigration laws are arbitrarily applied or conflict with the provisions of the Covenant. It refers to the Committee's Views in *Stewart v. Canada* and *Canepa v. Canada*,[4] in which the Committee did not consider the deportation of the authors, who had been convicted of criminal offences, to be in violation of articles 17 and 23 (1) of the Covenant. The State party notes that the deportation of the author to India will result in his physical separation from his parents and brother. It notes, however, that the author has been estranged from his family for a number of years. According to his own statement,[5] he was rebellious as a youth and left his parents' home when he was 12 or 13 years old. He lived on the street and then in a group home prior to his convictions. He only began living at his parents' house again as a condition of his release from detention. The State party submits that the decision that the author was inadmissible, which led to the deportation order against him, was neither unlawful nor arbitrary but was authorized by law and was subjected to judicial review by the Federal Court. It further argues that the disruption to the author's weak family connections is outweighed by the State interest in removing him from Canada. It argues that the author's removal is reasonable in the circumstances and proportionate to the seriousness of his crimes. It notes that, in his communication, the author has relied on the Committee's jurisprudence in *Warsame v. Canada* and *Nystrom v. Australia*.[6] It argues

[3] See *Stewart v. Canada* (CCPR/C/58/D/538/1993), para. 12.5.

[4] See *Canepa v. Canada* (CCPR/C/59/D/558/1993).

[5] The State party refers to the record of a detention hearing against the author on 10 April 2013.

[6] See *Nystrom v. Australia* (CCPR/C/102/D/1557/2007).

that the Committee's Views in those cases represented a departure from the Committee's consistent Views with respect to the deportation of a long-term resident for serious criminality and that the outcomes in these cases were out of step with an appropriate interpretation of State obligations under the Covenant. The State party submits that, in the case of the author, given his serious criminal record and his family situation, his removal from Canada would not be a disproportionate interference with his family relations. It argues that the author has been convicted of several serious offences involving drugs and weapons, which represent a risk of harm to others. He is a single, male adult without a partner or children and he was estranged from his family throughout his teenage years. In the circumstances, the prospective removal of the author, to the extent it can be said to be an interference with his family, is a justifiable and proportionate interference with his family life.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 12 January 2015, the author submitted his comments on the State party's observations. He maintains that the communication is admissible. In addition to his claims in the initial complaint of 4 July 2013, he submits that his rights under articles 3, 4 and 24 (3) of the Covenant have been violated.

5.2 The author argues that he has exhausted all available and effective domestic remedies. He refers to the Committee's jurisprudence and notes that there is no requirement to exhaust domestic remedies that objectively have no prospect of success and that would not provide an effective relief against the deportation order against him. He argues that the additional remedies suggested by the State party would fail to stay a deportation order. He also notes that his attempt to seek judicial review on the grounds at issue in the case, namely his nationality, were denied, which he argues demonstrates that there would be no reasonable prospect of success in attempting to exhaust the further remedies indicated by the State party. He argues that the State party's request that he refrain from submitting his complaint until these additional remedies have been exhausted is inconsistent with the State party's obligations under articles 3 and 4 of the Covenant.

5.3 The author claims that the State party's failure to recognize his citizenship would in effect render him stateless in contravention of article 24 (3) of the Covenant. The author refers to his complaint of 4 July 2013 and reiterates his claim that he is a Canadian citizen. The author notes that the Government of India has denied that he is an Indian citizen and has refused to issue him with travel documents. He argues that he has served his prison sentence, has been rehabilitated and has paid his debts to society. He has continuously tried, for the past five years, to be a fully contributing member of Canadian society, an ambition he claims has been obstructed by the deportation order against him.[7] He states that, despite this, he has further integrated into Canadian civil society through his engagement with non-governmental organizations, academia and the media. He reiterates that his right to privacy and family life would be irreparably harmed if he were to be deported to India. He argues that the State party's argument that he has weak family ties is inaccurate as he has lived with his parents for most of his life and is currently living with his brother. In the period when he was not living with his family, he was a ward of the State or incarcerated.

State party's additional observations

6.1 On 13 March 2015, the State party submitted its additional observations on the author's comments. In its observations the State party provides an update on the domestic proceedings. It notes that, by decision of 9 September 2014, the Federal Court denied the author's application for a declaration of citizenship. The Court noted that, in its decision of 8 December 2011, the Immigration and Refugee Board had found that the author was not a Canadian citizen, a decision that had been upheld on judicial review. The Court considered that the evidence presented did not establish that the author was a citizen by birth, as his case was significantly undermined by documentary evidence and the internal

[7] The author argues that he is subject to onerous conditions that prevent him from seeking and obtaining employment, prevent him from obtaining health-care benefits and impose conditions obstructing his ability to fully and freely participate in society.

inconsistencies in his own evidentiary record. In particular, the Court referred to contemporaneous documents that showed that the author's father did not receive a work permit until after the author's birth; immigration records that noted that the author was not a Canadian citizen; the diplomatic note that confirmed that the author's parents had ceased work at the High Commission of India after the author's birth; the author's father's use of his diplomatic passport after the author's birth; and the author's parents' application for permanent residence on behalf of the author. On the issue of whether Canada nad rendered the author stateless, the Court found that Canada had done nothing to deprive the author of his Canadian citizenship and that the author's position was based on the erroneous assumption that he held Canadian citizenship. On 8 October 2014, the author filed a notice of appeal with the Federal Court of Appeal. The State party notes that, should the appeal be unsuccessful, the author will be able to apply for leave to appeal to the Supreme Court. The State party further informs the Committee that, as concerns the author's claim that he is unable to obtain health-care benefits, this matter is pending before the Health Services Appeal and Review Board. The State party notes that the author was issued with a work permit on 28 January 2015, and that he is therefore able to work.

6.2 The State party refers to its observations of 10 January 2014 and notes that the author has not pursued any of the remedies noted in the observations, arguing that these remedies have no prospect of success. The State party refers to the Committee's jurisprudence according to which doubts about the effectiveness of domestic remedies do not absolve an author from exhausting them. It notes that the factual issue of his parents' place of employment — and status under Canadian law — at the time of his birth is still before the Federal Court of Appeal. It submits that while his appeal is pending, it cannot be said that the author's citizenship status has been conclusively determined under Canadian law. It further notes that, in its judgment, the Federal Court indicated that an application to the Minister of Citizenship and Immigration may have been a more appropriate avenue for the author to resolve his citizenship status, but that despite this, the author has not filed an application for Canadian citizenship. It further argues that whether the author is in fact stateless is yet to be determined as this requires a final determination of his Canadian citizenship as well as conclusive confirmation from Indian authorities that he is not an Indian citizen and is not eligible to apply for Indian citizenship. The State party submits that, as the author has not applied for either Canadian or Indian citizenship, he cannot be considered to be stateless, and that even if this could be considered to be the case, he has pursued none of the remedies available to stateless persons who find themselves in Canada and who wish to regularize their status. The State party notes that the author could apply for discretionary grant of citizenship, on the grounds that he is stateless and that Canada is the only country he has ever known. The State party argues that such a submission would be carefully considered by the Minister of Citizenship and Immigration, and that, in the event of a negative decision, the author could appeal to the Federal Court for judicial review. The State party argues that until the author pursues the remedies that are available to stateless persons in Canada, he cannot assert before the Committee that Canada has violated any rights that he may have as a stateless person.

6.3 The State party refers to its observations of 10 January 2014 and reiterates that the author's claims under articles 9 and 14 of the Covenant are inadmissible and that the author's claims under articles 12 (4), 17 and 23 (1) are without merit. In addition, the State party argues that, to the extent that the author's claims are based on his prospective deportation to India, they are at this point speculative and hypothetical, as until India issues travel documents to the author, he cannot be deported.

Author's comments on the State party's additional observations

7. On 25 May 2015 the author provided his comments on the State party's additional observations. He notes the State party's argument that his claims are inadmissible for failure to file an application to the Federal Court for a declaration of citizenship, but considers it moot, as the Federal Court has denied his application, thus making the remedy neither available nor effective. He reiterates that an application for permanent residence on the basis of humanitarian and compassionate grounds or for a temporary resident permit would not stay the deportation order in force against him and argues that these remedies are thus ineffective.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the State party's submission that the author's claims under article 24 (3) regarding recognition of citizenship are inadmissible for failure to exhaust domestic remedies, as the author's application for a declaration of citizenship is pending before the Federal Court of Appeal, with the possibility of a further appeal to the Supreme Court. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author. The Committee notes the author's argument that an application for a declaration of citizenship is not an available or effective remedy in his case, as the Federal Court denied his application in September 2014. The Committee notes, however, that in his appeal to the Federal Court of Appeal, the author raised the claim of his alleged status as stateless. It also notes that the author has not provided the Committee with any information on the status or outcome of his appeal or any information on a subsequent appeal to the Supreme Court. The Committee therefore considers that the author's claims under article 24 (3) are inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

8.4 The Committee further notes the State party's submission that the rest of the author's claims should also be declared inadmissible for failure to exhaust domestic remedies, as the author's application for a declaration of citizenship is pending before the Federal Court of Appeal and he has not submitted applications for: permanent residence on the basis of humanitarian and compassionate considerations; a temporary resident permit; a discretionary grant of citizenship; or a criminal record suspension. The Committee further notes the author's argument that, taking into account the steps he has already taken to prevent his removal to India, the additional remedies indicated by the State party would have no reasonable prospect of success. The Committee also notes the author's uncontested argument that the remedies indicated by the State party do not have suspensive effect and would thus not provide effective protection against the deportation order against him. The Committee notes that the author has filed several applications to prevent his deportation to India, namely an application for judicial review of the negative decision of the Immigration and Refugee Board of 19 December 2011, a pre-removal risk assessment application, a subsequent application for judicial review of the negative pre-removal risk assessment decision, and an application for a declaration of citizenship before the Federal Court. The Committee notes the State party's submission that an application for permanent residence under the humanitarian and compassionate procedure would be the remedy that is most directly applicable to the nature of the author's claim. It also notes that the procedure is described as a discretionary review to determine whether a person should be granted permanent residence in Canada for humanitarian and compassionate reasons and that the test is whether the applicant would suffer unusual, undeserved or disproportionate hardship if he or she had to apply for a permanent resident visa from outside of Canada. It further notes that examples of such hardship listed by the State party include a lack of critical medical or health care, discrimination that does not amount to persecution and adverse country conditions that have a direct, negative impact on the applicant. The Committee notes that none of these examples appear to be applicable to the author's case. The Committee further notes that an application under the humanitarian and compassionate procedure is an application for permanent residence in Canada and that the author previously had permanent resident status in Canada but lost this status in December 2011 following his criminal conviction. The Committee therefore considers, in addition to the non-suspensive effect of such an application, that it is unlikely that a discretionary application by the author under the humanitarian and compassionate procedure would have

had a reasonable prospect of success. The Committee further notes that, in addition to lacking suspensive effect, the other remedies indicated by the State party, namely an application for a temporary resident permit or an application for a discretionary grant of citizenship, are also described as being discretionary in nature and that an application for a criminal record suspension will not be available to the author until 2020. In these circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the rest of the author's claims.

8.5 The Committee notes the author's claim that the State party denied him the right to security of person and access to justice in violation of his rights under articles 9 and 14 of the Covenant by finding him not to be a Canadian citizen and consequently to be inadmissible in Canada, by denying him a full pre-removal risk assessment and by rejecting his application for judicial review of the inadmissibility decision. The Committee notes that the author disagrees with the decisions of the domestic authorities but that he has not provided any information or argumentation substantiating that he has been denied access to justice or to security of person. The Committee therefore finds that the author has failed to substantiate, for purposes of admissibility, his allegations under articles 9 and 14 of the Covenant. The Committee also notes that the author has claimed a violation of his rights under articles 3 and 4 of the Covenant, but has not provided any additional information or substantiation in this regard apart from his assertion that the State party's submission that he has failed to exhaust domestic remedies is inconsistent with the State party's obligations under articles 3 and 4 of the Covenant. Accordingly, the Committee declares the author's claims under articles 3, 4, 9 and 14 inadmissible under article 2 of the Optional Protocol.

8.6 In the absence of any other challenge to the admissibility of the communication, the Committee declares the communication admissible insofar as it concerns the author's claims under articles 12 (4), 17 and 23 (1) read alone and in conjunction with article 2 (3) of the Covenant, and proceeds to its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 With regard to the author's claim under article 12 (4) of the Covenant, the Committee must first consider whether Canada is the author's "own country" for purposes of this provision and whether his deportation from Canada and deprivation of the right to enter that country would be arbitrary. The Committee recalls its general comment No. 27 (1999) on freedom of movement, where it has considered that the scope of "his own country" is broader than the concept of "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.[8] The Committee recalls its jurisprudence in which it has stated that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. It has noted that the words "his own country" invite consideration of such matters as long-standing residence, close personal and family ties and intentions to remain, as well as the absence of such ties elsewhere.[9]

9.3 In the present case, the Committee notes that it is uncontested that the author was born in Canada, has lived in Canada his entire life and received his education there. His parents and brother reside in Canada and are all Canadian citizens. He has never resided in India and has only visited the country once, when he was 11 years old, for a period of two weeks, and the record contains no evidence that he has any relationship or connection to any person in India. Furthermore, the author alleges that neither he nor his parents applied for Canadian citizenship for him as they believed he was a Canadian citizen by virtue of his having been born in Canada, a jus soli jurisdiction, a belief they argue was confirmed by

[8] See the Committee's general comment No. 27, para. 20.

[9] See *Warsame v. Canada*, para. 8.4 and *Nystrom v. Australia*, para. 7.4.

the fact that the author was twice issued with a Canadian passport and the fact that his brother, who also was born in Canada, is a Canadian citizen. The Committee notes that, had the author not been issued with a Canadian passport, he would have become aware much earlier that he was not considered to be a Canadian citizen, at which point he could have applied for citizenship. The Committee therefore considers, taking into account the particular circumstances of the case — including the strong ties connecting the author to Canada, the presence of his family in Canada, the language he speaks, the duration of his stay in the country, the confusion regarding his nationality and the lack of any ties to India other than at best formal nationality, which is not confirmed — that the author has established that Canada is his own country within the meaning of article 12 (4) of the Covenant.

9.4 As to the alleged arbitrariness of the author's deportation, the Committee recalls its jurisprudence that interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.[10] The notion of "arbitrariness" includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[11] It has further noted that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.[12] The Committee notes the State party's argument that the removal of the author to India is reasonable in the circumstances of his case and proportionate to the seriousness of his crimes. In the present case, taking into account the fact that the author's two convictions date from 2009 and 2010, the fact that he has not reoffended since his release, the fact that nothing on file indicates that his convictions were for violent offences[13] and his submission that he has been rehabilitated, the Committee considers that the interference with the author's rights under article 12 (4) would be disproportionate to the stated legitimate aim of preventing the commission of further crimes. In these circumstances, the Committee concludes that the author's deportation to India, if implemented, would violate his rights under article 12 (4) of the Covenant.

9.5 As to the alleged violation under articles 17 and 23 (1), read alone and in conjunction with article 2 (3) of the Covenant, the Committee recalls its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain on its territory would involve interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain on the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.[14] The Committee also recalls its general comments No. 16 and No. 19, whereby the concept of the family is to be interpreted broadly. It also recalls that the separation of a person from his or her family by means of expulsion could be regarded as an arbitrary interference with the family and a violation of article 17 if, in the circumstances of the case, the separation of the author from his or her family and its effects on him or her were disproportionate to the objectives of the removal.[15]

9.6 The Committee observes that the author's deportation to India will interfere with his family relations in Canada. The Committee, therefore, must examine whether that interference could be considered either arbitrary or unlawful. The Committee recalls that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of

[10] See *Warsame v. Canada*, para. 8.6 and *Nystrom v. Australia*, para. 7.6.

[11] See the Committee's general comment No. 35 (2014) on liberty and security of person, para. 12.

[12] See *Warsame v. Canada*, para. 8.6 and *Nystrom v. Australia*, para. 7.6.

[13] It can be noted that the authors in *Nystrom v. Australia*, *Warsame v. Canada*, *Dauphin v. Canada* (CCPR/C/96/D/1792/2008) and *A.B. v. Canada* (CCPR/C/117/D/2387/2014) were convicted, among other offences, of aggravated rape and armed robbery; robbery; robbery with violence; and aggravated assault and robbery, respectively.

[14] See, for example, *Warsame v. Canada*, para. 8.7, *Winata v. Australia* (CCPR/C/72/D/930/2000), para. 7.1, *Madafferi et al. v. Australia* (CCPR/C/81/D/1011/2001), para. 9.7, *Byahuranga v. Denmark* (CCPR/C/82/D/1222/2003), para. 11.5 and *Dauphin v. Canada*, para. 8.1.

[15] See *Canepa v. Canada*, para. 11.4.

predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. The Committee also recalls that the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal.[16]

9.7 The Committee notes that, in the present case, the State party's Immigration and Refugee Protection Act expressly provides that the permanent resident status of a non-national may be revoked if the resident has been convicted of a criminal offence for which a term of imprisonment of more than six months has been imposed. The Committee also notes the State party's argument that the removal of the author to India is reasonable in the circumstances of his case and proportionate to the seriousness of his crimes. The Committee further notes the author's claim that he lacks any ties to India; that he maintains a close relationship with his parents and brother; that his deportation would lead to a complete disruption of his family ties owing to the fact that his family would not be able to visit him in India for financial reasons; and that he is integrated into Canadian society and has been rehabilitated. The Committee further notes that the intensity of the author's family ties with his family remains disputed between the parties. It notes, however, the author's statement that he is currently living with his brother and that he wishes to remain close to his family. It also notes that, as a condition for his release from detention, the author was required to reside with his parents. In these circumstances, the Committee observes that the author's family ties would be adversely affected if he were to be deported to India. The Committee further notes that the author's two convictions date from 2009 and 2010 and that he has not reoffended since his release. The Committee therefore concludes that the interference with the author's family life would be disproportionate to the legitimate aim of preventing the commission of further crimes. It thus concludes that the author's deportation to India, if implemented, would constitute a violation of articles 17 and 23 (1).

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the author's deportation to India would, if implemented, violate his rights under articles 12 (4), 17 and 23 (1) of the Covenant.

11. In accordance with article 2 (1) of the Covenant, which establishes that States parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, the State party is under an obligation to review the author's case, taking into account the State party's obligations under the Covenant and the present Views. The State party is also requested to refrain from expelling the author while his case is being reconsidered.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[16] See *A.B. v. Canada*, para. 8.7.

Annex

Joint opinion of Committee members Yuval Shany and Christof Heyns (partly concurring, partly dissenting)

1. We do not share the position of the Committee with regard to the issue of exhaustion of local remedies. In particular, we remain unconvinced that the author's claims could not have been properly raised at the domestic level in the context of an application for permanent residence on the basis of humanitarian and compassionate considerations (H&C application). While the author expressed doubts about the effectiveness of this procedure, it is well established in the Committee's case law that mere doubts about the effectiveness of local remedies do not absolve an author from pursuing such remedies.[1] Furthermore, the fact, as noted by the Committee in para. 8.4, that the H&C process has no suspensive effect appears to us to be of little relevance in such cases as this, which do not involve a claim of irreparable harm, and even more so in cases where no concrete information about an impending deportation date has been alleged (we note, in this regard, that the author has not yet been deported, although he lost his permanent resident status in 2011).

2. According to the policy, procedures and guidance used by Immigration, Refugees and Citizenship Canada staff, published on that department's official website, among the factors to be considered in H&C applications are the following: establishment in Canada, ties to Canada, factors in country of deportation, consequences of separation of relatives, and other unique or exceptional circumstances.[2] All these appear to be highly relevant to the author's situation, to many of his claims under the Covenant, and also to the question of whether he should be allowed to submit his H&C application from Canada (although, as indicated above, given the absence of irreparable harm, even requiring the author to submit the application from India would not necessarily render the H&C remedy ineffective).

3. The Committee has rightly noted that the author has already resorted to multiple legal proceedings in Canada: challenging the decision to revoke his permanent residence, requesting a declaration of citizenship and applying for a pre-removal risk assessment. Still, on the basis of the information before us, and given the limited explanation provided by the author as to why his claims for violation of the Covenant could not be raised in H&C proceedings, we are not persuaded that the author has fully exhausted all reasonably available effective remedies. The discretionary nature of the H&C process does not imply that it is ineffective. The State party has indeed demonstrated that, on numerous past occasions, such discretion was applied so as to provide temporary resident permits to individuals who were previously held to be inadmissible owing to serious criminality (para. 4.9). We also note that the State party's assertion that the H&C process is most directly applicable to the nature of the author's claim has not been effectively rebutted by the author.

4. Had the case been admissible, we would have agreed with the Committee on the merits that the author's rights under article 12 (4) of the Covenant were violated in the circumstances of the case, since Canada is "his own country" for all the reasons specified in para. 9.3 of the Views.

5. We do have serious doubts, however, as to whether the author established on the merits that any of his other rights under the Covenant would also be violated as a result of his deportation to India. Given the author's weak family ties throughout the years (discussed by the parties in paragraphs 4.16 and 5.3 of the Views), his status as a 29-year-old single adult (24-year-old at the time of application to the Committee) and his ability to continue and maintain family contacts even if deported, we would not have considered his deportation as a disproportionate response to the serious crimes he had committed by virtue of the adverse impact that deportation would have on his family life. We thus dissociate

[1] See *A v. Australia* (CCPR/C/59/D/560/1993), para. 6.4.

[2] See www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-hardship-assessment.html.

ourselves from the finding of violations of articles 17 and 23 (1) of the Covenant in para. 9.7 of the Views, separately from the violation of his rights under article 12 (4).

6. In sum, on admissibility, we would have found the communication inadmissible for lack of exhaustion of domestic remedies, pursuant to article 5 (2) (b) of the Optional Protocol, and on the merits, we only support the Committee's findings of a violation of article 12 (4).